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IN THE

SUPREME COURT OF THE UNITED STATES

NO. 79-6366

LARRY LYNN BLAKNEY,

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Petitioner,

-vs-

STATE OF MONTANA,

Respondent.

PETITIONER'S REPLY TO RESPONDENT'S
BRIEF IN OPPOSITION

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ATTORNEYS FOR PETITIONER

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In its brief in opposition to petitioner's petition for writ of certiorari, respondent essentially argues that neither of the issues tendered by petitioner as justification for issuance of the writ are of such significance in application as to warrant issuance of the writ.

In reference to petitioner's first issue, respondent's argument suggests tacit acknowledgment of petitioner's contention that the Montana Supreme Court acted improperly in holding harmless error occured when petitioner was required to carry the burden of proof during hearing on his motion to suppress. However respondent contends that such action will not occur again given the discussion of the court in State v. Blakney _____Mont. _____, 605 P.2d 1093 (1979). Thus, respondent maintains that the application of the ruling is so narrow in scope that no substantial federal question exists.

In reference to petitioner's second issue, respondent claims that the question of waiver of right to counsel was thoroughly examined by the Montana courts and resolved in respondent's favor and thus, further review of a largly

factual determination is all that is sought by petitioner.

Rule 19, Revised Rules of the Supreme Court of the United States provides in pertinent part:

> "1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:
>
> > "(a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court."

Construction of this rule was the focus of the Court's attention in Rice v. Sioux Memorial Park Cemetery, Inc. et al., 349 U.S. 70 (1955). Here the court noted that its function was not to review for the benefit of individual litigants and that "special and important resons" must exist for the granting of the writ. The Court stated that " '[s]pecial and important reasons' imply a reach to a problem beyond the academic or the episodic." 349 U.S. at 74.

The Court in Rice also quotes approvingly from the earlier case of Layne & Bowler Corp. v. Western Well Works, Inc., 261 U.S. 387. (1923) where the Court, in dismissing proceedings for a writ of certiorari which had been granted stated:

> "[I]t is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties . . ."

261 U.S. at 393.

The instant case does not present a situation, as did Rice, supra, where the issue for review was effectively rendered moot before conclusion of the proceedings on the

writ. Neither does the case involve determination of issues so narrow in application as to be significant only to the parties; the importance of resolution to the petitioner is patently obvious. Rather, petitioner submits that the decision of the Montana Supreme Court in State v. Blakney _____Mont._____, 605 P.2d 1093 (1979) suggests a tenor of constitutional interpretation which is contrary to the spirit and essence of prior decisions of this Court and smacks of a developing pattern of constitutional disregard which should be halted and reversed in its incipient stages. If the Supreme Court of Montana is permitted to hold, as it did here, that a ruling flatly contrary to an established and well defined body of case law governing burden of proof, is harmless error beyond a reasonable doubt and further, that conflicting, contradictory and impeachable testimony is all that is needed to sustain the state's heavy burden of showing waiver of right to counsel, the significance of the detriment to these and other constitutional rights in future Montana cases is apparent, albeit necessarily conjectural. It is difficult to conceive of a more lucid example of state court action "not in accord with applicable decisions of this court" than that supported by the decision and record in the instant case.

Respectfully submitted,

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